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No. 89-1679

# In the Supreme Court

OF THE

## United States

OCTOBER TERM, 1989

SUMMIT HEALTH, LTD., a corporation; MIDWAY HOSPITAL MEDICAL CENTER, a California general hospital; THE MEDICAL STAFF OF MIDWAY HOSPITAL MEDICAL CENTER, an unincorporated association; MITCHELL FELDMAN; AUGUST READER; ARTHUR N. LURVEY; JONATHAN I. MACY; JAMES J. SALZ; GILBERT PERLMAN; MARK KADZIELSKI; and WEISSBURG & ARONSON,

*Petitioners,*

vs.

SIMON J. PINHAS, M.D.

*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

**OPINION BELOW**

The Ninth Circuit Opinion in *Pinhas v. Summit Health, Ltd.* is reported at 894 F.2d 1024 (9th Cir. 1989) (the opinion was amended on denial of rehearing on January 25, 1990).

## STATEMENT OF THE CASE

Dr. Simon J. Pinhas ("Dr. Pinhas") initiated this action on May 21, 1987, and filed his First Amended Complaint on July 13, 1987. Dr. Pinhas alleges that each petitioner is engaged in interstate commerce. Together they engaged in a conspiracy to effectuate a boycott and drive Dr. Pinhas out of business in order to capture for themselves a greater share of eye care and ophthalmic surgery in Los Angeles. (Joint Appendix, pp. 3-6; 39.)

The petitioners formed their conspiracy to deprive Dr. Pinhas of hospital staff privileges solely as a method of accomplishing their anticompetitive purpose, and not for legitimate reasons of peer review. The "proximate cause" was an internal dispute over a medical staff rule requiring assistant surgeons to be present at certain eye surgeries. Dr. Pinhas opposed this requirement because it forced him to compensate his competitors for unnecessary work. His competitors benefitted because Dr. Pinhas performed more surgeries than any other ophthalmic surgeon on the staff; the requirement thus served to "redistribute" Dr. Pinhas's income to his competitors. (Joint Appendix, pp. 7-9.)

Instead of supporting Dr. Pinhas, the hospital tried to "buy him off" by offering him a "sham" contract under which the hospital would pay him for "services" which he would not have to perform. Dr. Pinhas rejected this "reimbursement" as dishonest, and in the ensuing dispute the chief of the medical staff threatened to institute disciplinary proceedings if Dr. Pinhas refused to return the "sham" contract. Dr. Pinhas refused. (Joint Appendix, pp. 9-10.)

In furtherance of the conspiracy, the petitioners brought false charges against Dr. Pinhas in order to



cause a summary suspension and termination of his medical staff privileges at Midway Hospital, and then violated his substantive and procedural rights in order to assure an adverse determination on the false charges. Petitioners intended to preclude Dr. Pinhas from practicing at any hospital in California or the rest of the United States by reporting the summary suspension and termination to the Board of Medical Quality Assurance (now the Medical Board of California). They knew that a report of their charges would be disseminated to all hospitals in California and they intended to cause similar action by those hospitals.[1] Without hospital staff privileges, Dr. Pinhas cannot practice surgery, which constitutes the greater portion of his practice. (Joint Appendix, pp. 3-6; 39-41.)

Petitioners' misuse of the peer review process to effectuate the boycott demonstrates that they did not institute the peer review proceedings in a reasonable belief that the action was in furtherance of quality health care; did not make a reasonable effort to obtain the facts of the matter; did not provide Dr. Pinhas with a fair hearing; and did not institute the peer review based upon a reasonable belief that the action was warranted by the facts. (Joint Appendix, p. 41.)

On October 9, 1987, the District Court entered its Order granting petitioners' motion to dismiss the First Amended Complaint without leave to amend. (Joint Ap-

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[1] After the Ninth Circuit issued its amended opinion, Cedars-Sinai Hospital, located about 2 miles from Midway, denied Dr. Pinhas's application for staff privileges based *solely* upon receipt by its medical staff "of a Business and Professions Code 805 Report filed by Midway Hospital ...." See Appendix A, p. a-3, and explanatory note thereto. Dr. Pinhas intends to amend his Complaint to seek damages as a result of this impact of the Midway peer review proceedings.

pendix, p. 315.) Dr. Pinhas never obtained the right to conduct discovery on the jurisdictional issue, despite his request for that right. (Joint Appendix, p. 241, fn. 7.)

The Ninth Circuit reversed, rejecting petitioners' argument that Dr. Pinhas must make the particularized showing of the effect on interstate commerce caused by the alleged conspiracy to keep him from working. The Ninth Circuit held that Dr. Pinhas

> "need only prove that peer-review proceedings have an effect on interstate commerce, a fact that can hardly be disputed. The proceedings affect the entire staff at Midway and thus affect the hospital's interstate commerce." (Appendix to the Petition for Writ of Certiorari ("App. Pet.") at A-20, 894 F.2d at 1032.)

## SUMMARY OF ARGUMENT

Ten years ago, this Court issued a unanimous opinion in *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232, 100 S.Ct. 502 (1980) establishing the standard for jurisdiction under the Sherman Act. Unfortunately, a number of lower courts have misinterpreted *McLain*, making it important for this Court to reinforce that decision.

Petitioners (collectively "Summit") devoted their entire brief to criticizing Judge Wiggins's opinion for the Ninth Circuit, claiming that it failed to require a nexus between interstate commerce and the activity "infected" by the antitrust violation, as required by *McLain*. Summit's criticisms miss the mark because it misunderstands the nature of peer review.

Summit provides hospital facilities for use by surgeons and uses the peer review process to control access to that marketplace. Because Summit refuses to acknowledge



peer review as a method of controlling access to the marketplace, it fails to recognize that the Ninth Circuit, based upon a narrow reading of *McLain*, did require Dr. Pinhas to show a nexus between interstate commerce and the "infected" activity, *i.e.*, the peer review proceedings at Midway Hospital.

Summit's Brief fails to provide any alternative to the Ninth Circuit's focus on the "infected" activity. For lack of any alternative under which it might prevail, Summit must perforce argue that Dr. Pinhas is required to show a nexus between interstate commerce and his removal from the hospital staff. This proposed test cannot be reconciled with *McLain* and would frustrate the Congressional goal of free competition.

Because Summit can propose just one test which might require a change in the result below, rejection of that test means that the Ninth Circuit reached the correct result as long as it applied its test properly. The Ninth Circuit correctly decided that Dr. Pinhas could show the required nexus, the effect of the restraint of trade on interstate commerce being indisputable. Summit's provision of hospital services undeniably involves interstate commerce. The peer review process, which controls the admission of physicians to the hospital staff, necessarily affects the provision of hospital services because the hospital can provide its services only through the physicians on its medical staff.

Moreover, Congress exercised its Commerce Clause power to regulate peer review proceedings when it passed the Health Care Quality Improvement Act of 1986 ("HCQIA"). The Commerce Clause also provides the Constitutional basis for the Sherman Act, and the Sherman Act is as inclusive as Congressional power to regulate commerce. For this reason, if Congress can regulate

an activity, courts have jurisdiction under the Sherman Act. The passage of HCQIA therefore confirms the Ninth Circuit's conclusion.

Although the Ninth Circuit reached the correct result, it forced Dr. Pinhas to meet a stricter jurisdictional test than necessary. The Amici States urge this Court to adopt a "general business activities" test for Sherman Act "effect on commerce" jurisdiction. Dr. Pinhas does not need application of that test in order to prevail, but he supports the Amici States and suggests additional considerations in favor of their position in the final section of this Brief.

## ARGUMENT

### I.

### THE NINTH CIRCUIT DID NOT DEPART FROM *McLAIN* AND PETITIONERS ERR IN CLAIMING THAT IT DID; AN ACCURATE UNDERSTANDING OF THE NINTH CIRCUIT'S OPINION IS ESSENTIAL IN ORDER TO DEFINE THE ISSUES

In *McLain* the petitioners sued six real estate firms, two trade associations, and a class of real estate brokers. The petitioners alleged a conspiracy to fix prices by means of a variety of anticompetitive practices. The lower courts dismissed the action for lack of jurisdiction on the ground that the petitioners failed to demonstrate that the real estate brokers were integral participants in the interstate aspects of real estate transactions.

This Court reversed because the Court of Appeals limited petitioners to an "in commerce" theory of jurisdiction. "It can no longer be doubted, however, that the jurisdictional requirement of the Sherman Act may be satisfied under either the 'in commerce' or the 'effect on



commerce' theory." 444 U.S. at 242. Applying this theory, the petitioners could establish federal jurisdiction by showing "that respondents' activities which allegedly have been infected by a price-fixing conspiracy . . . 'as a matter of practical economics' . . . have a not insubstantial effect on the interstate commerce involved." *Id.* at 246.

According to Summit, the Ninth Circuit departed from *McLain* because it failed to require a factual relationship between the restraint and interstate commerce, did not analyze the practical economic effects of the restraint on interstate commerce, and "ignored" the essential aspect of this Court's analysis in *McLain*. Summit concludes that the Ninth Circuit thereby eliminated the requirement for a "relationship" between the challenged activity and interstate commerce. Petitioners' Brief ("Pet. Br.") pp. 10-11. Before discussing any other issues, Dr. Pinhas must first correct Summit's inaccurate description of Judge Wiggins's opinion; only then can the fundamental points in dispute be identified.

Taking Summit's charges in order, the Ninth Circuit did require a factual relationship between the restraint of trade and interstate commerce, and did analyze the practical economic effects of the restraint on interstate commerce. The Ninth Circuit determined that the peer review process in general at Midway Hospital was the relevant restraint (because Dr. Pinhas alleges that Summit misused this process to effectuate the anticompetitive conspiracy). App. Pet. at A-19, 894 F.2d at 1032. It then found the effect of that restraint on interstate commerce to be "a fact that can hardly be disputed." App. Pet. at A-20, 894 F.2d at 1032. Summit may not agree with the Ninth Circuit's selection of the relevant restraint, or its analysis of the effect of that restraint, but it goes much

too far in accusing the Ninth Circuit of failing to do these things.

Nor can Summit defend its charge that in selecting the relevant restraint, the Ninth Circuit "ignore[d] the 'infected' activity analysis upon which the *McLain* ruling was actually based." Pet. Br. p. 11. In fact, the Ninth Circuit justified its selection of the peer review process as the relevant restraint by paraphrasing and citing the precise passage in *McLain* where this Court used the "infected" terminology (compare the following passage to the language at the top of the page at 444 U.S. 246):

> ". . . Pinhas must show that 'as a matter of practical economics' the activities of the appellees — the peer review process in general — have a 'not insubstantial effect on the interstate commerce involved.' *McLain*, 444 U.S. at 246; 100 S.Ct. at 511." App. Pet. at A-19, 894 F.2d at 1032.

Given these errors by Summit, its conclusion that the Ninth Circuit eliminated the requirement of a nexus with interstate commerce lacks any support. Certainly the Ninth Circuit did not intend to eliminate any nexus requirement. That court explicitly stated:

> "Appellees contend that Pinhas's amended complaint fails to establish jurisdiction under the Sherman Act because it does not sufficiently allege 'a required nexus with interstate commerce.' • • •
>
> In order to establish jurisdiction under the Sherman Act, a plaintiff must 'identify a relevant aspect of interstate commerce and then show "as a matter of practical economics" that the Hospital's activities have a "not insubstantial effect on the interstate commerce involved."' " App. Pet. at A-18 to A-19, 894 F.2d at 1031-1032.



That Summit unfairly criticized the Ninth Circuit does not, of course, resolve the issue. But an accurate assessment of that ruling does allow the parties to focus on the essential points of dispute rather than on such diversions as whether the Ninth Circuit eliminated the nexus requirement.

It appears that Summit contends that the Ninth Circuit (1) erred in identifying the "peer review process in general" at Midway Hospital as the relevant restraining activity (see Section II), and (2) then mis-analyzed the effect of that activity in concluding that the effect of such proceedings on interstate commerce "can hardly be disputed." (See Section III.) These issues are indeed crucial in deciding whether the Ninth Circuit reached the correct result. That it did reach the correct result may suffice for this one case, but this Court should take the opportunity to confirm that Sherman Act jurisdiction is much broader than the Ninth Circuit treated it, reaching as far as the Commerce Clause. (See Section IV.)

## II.

## THE NINTH CIRCUIT APPLIED THE STRICTEST TEST CONSISTENT WITH *McLAIN* AND OTHER COMMERCE CLAUSE DECISIONS WHEN IT IDENTIFIED THE RELEVANT RESTRAINT ON COMMERCE

The crux of the dispute is how to identify the relevant activity which must be tested for its effect on interstate commerce. The selection of the relevant activity can itself determine the likelihood of finding a substantial effect on interstate commerce — a court which focuses on the general business activities of a sugar refiner likely will find a substantial effect on interstate commerce, while one which looks at the sale of a single bag of price-fixed sugar surely

will not. See *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 68 S.Ct. 996 (1948).

Although Summit's Brief nowhere identifies what activity the Ninth Circuit should have examined, it argued below that the inquiry should be limited to the removal of Dr. Pinhas from the hospital staff. The lack of any alternative which would avail it, forces Summit to adopt this position here. Summit's proposed test is inconsistent with *McLain* and other authority, and would inhibit the important Congressional policy of encouraging free competition.

### A. What Are The Possible Relevant Activities Which Must Have A "Nexus" With Interstate Commerce?

Commentators have identified a spectrum of possible methods for identifying the relevant activity which "affects" interstate commerce. Ranging from broad to narrow, these include:

(a) **The General Business Activities Test.**[2] Under this test, if Summit's general business activities have a not insubstantial effect on interstate commerce, courts have jurisdiction under the Sherman Act.

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[2]E.g., Note, *The Interstate Commerce Test For Jurisdiction In Sherman Act Cases And Its Substantive Applications*, 15 Ga.L.Rev. 714, 715 esp. fn. 6 (Spring 1981); Comment, *Sherman Act "Jurisdiction" In Hospital Staff Exclusion Cases*, 132 U.Pa.L.Rev. 121, 132-134 (December 1983); Havighurst, *Doctors And Hospitals: An Antitrust Perspective On Traditional Relationships*, 1984 Duke L.J. 1071, 1142-1144; Trail and Kelley-Claybrook, *Hospital Liability And The Staff Privileges Dilemma*, 37 Baylor L.Rev. 316, 350 (Spring 1985); Comment, *A Case Of Judicial Backsliding: Artificial Restraints On The Commerce Power Reach Of The Sherman Act*, 1985 Ill.L.Rev. 163, 180-182; Mann, *The Affecting Commerce Test: The Aftermath Of McLain*, 24 Houston L.Rev. 849 (October 1987).



(b) **The Infected Activities Test.**[3] Under this test, the court considers a reasonable general category which encompasses the particular wrongful conduct. This test therefore emphasizes only those general activities in which the violation occurred.

(c) **The Particular Wrongful Conduct Test.**[4] To establish jurisdiction under this test, Dr. Pinhas would have to show that the alleged wrongful conduct itself, against him personally, had a substantial effect on interstate commerce.

As noted above, the Ninth Circuit adopted the middle test, concluding that the alleged boycott "infected" the "peer review process in general." Since application of the "general business activities" test would certainly result in jurisdiction — Summit's 1989 10K[5] describes it as "a health care company, which at June 30, 1989 operated 21 acute care hospitals, with a total of 2,977 licensed beds, and 17 nursing facilities, with a total of 2,230 licensed beds in California, Texas, Arizona, Iowa, Colorado, and in

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[3]E.g., Kissam, Webber, Bigus & Holzgraefe, *Antitrust and Hospital Privileges: Testing The Conventional Wisdom*, 70 Cal.L.Rev. 595, 632 (May 1982); Mann, *The Affecting Commerce Test: The Aftermath Of McLain*, 24 Houston L.Rev. 849, 864-871 (October 1987).

[4]E.g., Comment, *Sherman Act "Jurisdiction" In Hospital Staff Exclusion Cases*, 132 U.Pa.L.Rev. 121, 139-141 (December 1983); Havighurst, *Doctors And Hospitals: An Antitrust Perspective On Traditional Relationships*, 1984 Duke L.J. 1071, 1142-1144; Comment, *A Case Of Judicial Backsliding: Artificial Restraints On The Commerce Power Reach Of The Sherman Act*, 1985 Ill. L.Rev. 163, 182-184.

[5]Form 10-K dated as of September 29, 1989, and filed with the Securities and Exchange Commission. Copies of the first two pages are attached as Appendix B (see p. b-3). Pursuant to F.R.E. 201, Dr. Pinhas requests that this Court take judicial notice of these facts. See also Joint Appendix, pp. 2-3.

the Kingdom of Saudi Arabia" — Summit can prevail only by arguing that the Ninth Circuit erred in failing to focus on the particular conduct directed solely against Dr. Pinhas.[6]

### B. The Ninth Circuit Properly Rejected Petitioners' Proposed "Particular Wrongful Conduct" Test.

Summit actually made such an argument to the Ninth Circuit, which rightly rejected it:

> "Appellees' primary contention is that interstate commerce will not be affected by the removal of Pinhas from the hospital staff.
>
> • • •
>
> Pinhas need not, as appellees apparently believe, make the more particularized showing of the effect on interstate commerce caused by the alleged conspiracy to keep him from working. [*McLain*,] at 242-43, 100 S.Ct. at 509. . . . Appellees' contention that Pinhas failed to allege a nexus with interstate commerce because the absence of Pinhas' services will not drastically affect the interstate commerce of Midway therefore misses the mark and must be rejected." App. Pet. at A-19 to A-20, 894 F.2d at 1031-1032 (footnote omitted).

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[6]Even if Summit convinces this Court to adopt its preferred test, that would not justify dismissal of Dr. Pinhas's action. *McLain*, 444 U.S. at 246-247; *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715, 724-725 (10th Cir. 1981). See also, *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 602 (9th Cir. 1976) ("... it seems settled that, when a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiffs' substantive claim for relief, a motion to dismiss for lack of subject matter jurisdiction rather than for failure to state a claim is proper only when the allegations of the complaint are frivolous.")



In reaching this conclusion, the Ninth Circuit again took its guidance from *McLain*. In the passage cited by the Ninth Circuit, this Court explicitly stated:

> "To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity. Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful. The validity of this approach is confirmed by an examination of the case law. If establishing jurisdiction required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect. This is not the rule of our cases." 444 U.S. at 242-243, 100 S.Ct. at 509.

The Ninth Circuit plainly understood this passage from *McLain* as rejecting Summit's particular wrongful conduct test. Summit's counter-interpretation of *McLain* cannot withstand scrutiny, and its indirect effort to substitute its test by criticizing the Ninth Circuit fails because it misunderstands Judge Wiggins's opinion. Summit so constrains jurisdiction that the Tenth Circuit, whose opinions Summit cites favorably, recently rejected Summit's "particularized" test.[7] Finally, Summit's test, if adopted, would divorce the Sherman Act from its recognized jurisdictional base.

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[7]*Anesthesia Advantage, Inc. v. The Metz Group*, 1990-2 Trade Cas. (CCH) ¶ 69,144 (10th Cir. 1990), discussed below.

### 1. This Court Rejected Petitioners' Test in *McLain*.

Summit's principal difficulty is that *McLain* both explicitly and implicitly rejects its test. Implicitly because Summit's test, by limiting the inquiry to the impact on the particular plaintiff, tends to link interstate commerce only with the business activities of the plaintiff, not the defendants. Yet *McLain* relied solely on the interstate commerce effect of the defendants' activities. Moreover, the Third Circuit reversed a district court decision analyzing only the plaintiff's activities. *Cardio-Medical Assoc., Ltd. v. Crozer-Chester Med. Center*, 721 F.2d 68, 74-75 (3d Cir. 1983).

Because the Ninth Circuit understood *McLain's* explicit words to reject Summit's test, Summit must also suggest that the following two sentences have some interpretation other than their plain meaning as understood by the Ninth Circuit:

> "To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity. Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful." 444 U.S. at 242-243.

Summit argues that the second sentence does not, as it seems, reject its favored test, but merely eliminates the need for an elaborate analysis of the interstate impact at this stage of the litigation. (Pet. Br. 11-13.) By focusing on the second sentence, Summit ignores the one immediately preceding it. That first sentence cannot be reconciled with a "particular wrongful conduct" test, because it



required the petitioners in *McLain* only to demonstrate a substantial effect on interstate commerce "generated by respondents' brokerage activity" (not "generated by the particular wrongful act which affected each petitioner"). Summit's proposed interpretation of the second sentence is simply irrelevant because the first sentence alone defeats its test.

If Summit could ignore the first sentence, it might be able to argue that the second sentence only eliminated the need for a detailed analysis of the interstate impact. Such an interpretation would be plausible if this Court had revised its sentence to read, "Petitioners need not make ~~the~~ [a] more particularized showing of ~~an~~ [the] effect . . . " Without these changes, the plain meaning of the sentence rejects the particular wrongful conduct test in favor of the broader test announced in the previous sentence.

Other language in *McLain* confirms that the Ninth Circuit read it correctly. For example, at the top of page 246 this Court re-stated the test as requiring a not insubstantial effect on interstate commerce caused by "respondents' activities which allegedly have been infected by a price-fixing conspiracy". Dr. Pinhas understands the quoted phrase, in context, to refer to the respondents' real estate brokerage activities in general, rather than to a particular wrongful act (fixing brokerage fees).

If this Court had applied Summit's test in *McLain*, the petitioners there would have lost. Summit's attempt to force Dr. Pinhas to show effects arising solely from the impact of the wrongful conduct on him, must be rejected as contradicting the express language of *McLain*.

### 2. The Ninth Circuit Did Not Apply A General Business Activities Test, Contrary To Petitioners' Claims. Instead, It Recognized Petitioners' Use Of Peer Review As A Device To Control Market Access And Treated That As The "Infected" Activity.

In Section I, Dr. Pinhas corrected Summit's claims that the Ninth Circuit ignored the "infected" activity language in *McLain* and that the Ninth Circuit's interpretation would render superfluous the factual analysis contained in *McLain*. (Pet. Br. 11.) Summit apparently makes these mistakes because it refuses to acknowledge that peer review controls access to the facilities a surgeon needs in order to practice. Because Summit insists that peer review is a "non-economic" activity, and therefore cannot form part of the nexus, it wrongly concludes that the Ninth Circuit must have applied a general business activities test. In fact, the Ninth Circuit carefully identified the "infected" activity and analyzed the interstate commerce impact of that activity only. Thus, two of Summit's arguments in support of its position miss the mark because it mischaracterizes the Ninth Circuit's ruling as applying a general business activities test.

Summit makes the same mistake in its arguments at Pet. Br. 13-15. Here, Summit argues that the Ninth Circuit's purported elimination of a nexus requirement would unduly expand the reach of Federal regulation and would "magnify the volume" of cases "thrust" upon the Federal courts. Since the Ninth Circuit did no such thing, both arguments fail by starting from a false premise.[6]

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[6]Even if the Ninth Circuit had not required a nexus, Summit's arguments should be rejected. Summit has mis-directed its "federalism" argument. The Sherman Act provides no basis from which to expand the scope of Federal power; as shown below, its reach depends entirely on that of the Commerce Clause. Because the Ninth Circuit stayed far within the boundaries defining the power to regulate commerce, its decision in no way impacts considerations of "federalism".

Summit's "floodgates" argument assumes that there is such a thing in the abstract as "too many lawsuits." But some cases have merit, others don't. Summit provides no sieve to sort them. Moreover, the "floodgates" argument is peculiarly inappropriate given the context of this case, because in 1986 Congress passed the Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. § 11101 *et seq.* In Section 11111, Congress specifically granted immunity for Sherman Act (and other) liability arising out of peer review proceedings, provided that the affected physician receives certain fundamental rights denied to Dr. Pinhas. Since Congress constructed this dike, this Court need not build additional levees.



### 3. The Tenth Circuit, The Court On Whose Opinion Petitioners Rely, Also Rejects Their Proposed Test.

The Tenth Circuit, whose opinion in *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715 (10th Cir. 1980) Summit cites with approval, has rejected Summit's "particularized" test. *Anesthesia Advantage, Inc. v. The Metz Group*, 1990-2 Trade Cas. (CCH) ¶ 69,144 (10th Cir. 1990), involved Sherman Act claims by nurse anesthetists against physician anesthesiologists. The defendants allegedly caused certain hospitals to adopt rules discriminating against the plaintiffs in order to gain a competitive advantage. Faced with a challenge to jurisdiction, the plaintiffs showed that the hospitals received supplies and equipment, patients, and insurance payments in interstate commerce. The defendants argued that this evidence pertained only to their general business activities and did not suffice. The Tenth Circuit disagreed:

> "We reject defendants' assertion that plaintiffs must make the more particularized showing of how indi-

vidual patients of the individual defendant physician anesthesiologists received anesthesia services in which particular out-of-state anesthesia supplies or equipment were used or for which particular out-of-state insurance payments were made." ¶ 69,144 at p. 64,287.

By its criticism of the general business activities test, Summit implicitly suggests that the Ninth Circuit looked only at its general business activities, the same mistake made by the defendants in *Anesthesia Advantage*. Summit tries to force Dr. Pinhas to meet an overly restrictive test that looks only to the particular acts affecting him, the same mistake made by the defendants in *Anesthesia Advantage*. Summit's misconstruction of what the Ninth Circuit actually did, has forced Summit to take an extreme position rejected even by a court supposedly favorable to its view of *McLain*.

**4. The Sherman Act Is Merely A Means By Which Congress Regulates Commerce. Petitioners' Test Would Create An Unwarranted Distinction Between This Particular Method Of Regulation And Other Congressional Regulations.**

Summit's test would create an unwarranted distinction between the enforcement of the Sherman Act and Congressional power to regulate interstate commerce. Congressional power to enact the antitrust laws arises out of the Commerce Clause, Article I, Section 8. *Atlantic Cleaners & Dryers v. United States*, 286 U.S. 427, 434, 52 S.Ct. 607, 609 (1932). "Congress, in passing the Sherman Act,



left no area of its constitutional power unoccupied; it 'exercised "all of the power it possessed." ' " *United States v. Frankfort Distilleries*, 324 U.S. 293, 298, 65 S.Ct. 661, 664 (1945). Because the Sherman Act has its source in the Commerce Clause, and because it is as inclusive as the Commerce Clause, it is nothing other than a method by which Congress has chosen to exercise its undoubted power to regulate interstate commerce.

This Court has consistently upheld Congressional power to regulate commerce directly, even in cases in which the particular individual who suffered the wrong could not meet Summit's test. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S.Ct. 348 (1964); *Katzenbach v. McLung*, 379 U.S. 294, 85 S.Ct. 377 (1964); *Perez v. United States*, 402 U.S. 146, 150-156, 91 S.Ct. 1357, 1359-1362 (1971); and *Russell v. United States*, 471 U.S. 858, 105 S.Ct. 2455 (1985). In each of those cases, this Court upheld actions of Congress which affected a *class* of persons, without reference to the effect of the wrongful conduct on the particular individual. "Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez*, 402 U.S. at 154, 91 S.Ct. at 1361.

Summit's test would restrict the right of Congress to regulate analogous activities through its chosen vehicle for regulation, the Sherman Act. In this very case, Summit objects that the Ninth Circuit looked at the peer review process in general (part of a "class of activities") instead of the individual instance of Dr. Pinhas. But no principled basis exists to distinguish between Congressional power to regulate directly (under which Summit's test has been rejected) and Congressional power to regulate indirectly, via private enforcement actions and crimi-

nal sanctions, when both forms of regulation arise out of the same Constitutional source.[9]

Summit's criticisms of the Ninth Circuit must be rejected as inconsistent with *McLain* and the fundamental Congressional policy of supporting free enterprise.[10] The

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[9]Summit attempts to rebut this argument in footnote 7 of its Brief by citing to this Court's decision in *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 197 n.12, 95 S.Ct. 392, 399 (1974). Summit contends that *Gulf Oil* recognized a distinction between the jurisdiction of Congressional regulators and the jurisdiction of the judicial enforcers of Congressional regulations, notwithstanding the fact that the jurisdiction of each arises from the Commerce Clause. A brief review of *Gulf Oil* will show that Summit's contention is unfounded.

In that case, the petitioner argued that because Congress had regulated interstate roads and railroads, the manufacturer of materials used in construction of such roads must, as a matter of law, be deemed "in" interstate commerce. The petitioner had to prove that such articles were "in" interstate commerce, because it sued under Section 1 of the Clayton Act, 15 U.S.C. § 12. The Clayton Act contains solely the "in commerce" language and therefore differs from Section 1 of the Sherman Act, which includes within its scope matters "affecting" commerce. *Id.* at 194-195. The manufacturers of road materials may well have "affected" interstate commerce, but they were not "in" that commerce and therefore could not be regulated under the Clayton Act. This Court specifically contrasted the Sherman Act, in which Congress intended to exercise all of its Constitutional power, with the Clayton Act and the Robinson-Patman Act, where no such intent appeared. *Id.* at 194-195; 199-203. Thus, the distinction rested not with the forum deciding the merits — Congress versus the courts — but with the limited language of the Clayton Act.

[10] "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, *no matter how small*, is the freedom to compete — to assert with vigor, imagination, devotion and ingenuity whatever economic muscle it can



rejection of the only test which would avail Summit leaves for determination the issue whether the Ninth Circuit properly held that Dr. Pinhas could meet the test which it applied.

## III.

## THE NINTH CIRCUIT CORRECTLY DECIDED THAT PEER REVIEW PROCEEDINGS AFFECT INTERSTATE COMMERCE

The Ninth Circuit also held that Dr. Pinhas could meet the "infected activities" test:

> "He need only prove that peer-review proceedings have an effect on interstate commerce, a fact that can hardly be disputed. The proceedings affect the entire staff at Midway and thus affect the hospital's interstate commerce." App. Pet. at A-20, 894 F.2d at 1032.

Summit offers no "intensely practical, case-by-case review of the facts presented" (Pet. Br. 4) that would indicate why it is logically or factually unlikely that peer review affects interstate commerce. Instead, it offers two policy arguments against applying the antitrust laws to peer review activities.

As one policy justification, Summit reiterates (Pet. Br. 19-20) the "floodgates" argument refuted above (see fn. 8). In addition to the points mentioned earlier, Dr. Pinhas notes that Summit's "floodgates" argument raises very serious policy concerns. Summit wants to use a jurisdictional test to curb access to Federal courts. But because the Sherman Act reaches as far as the Commerce Clause, any restriction on Sherman Act jurisdiction will

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muster." *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 610, 92 S.Ct. 1126, 1135 (1972) (emphasis added).

inevitably be construed as limiting the scope of Congressional power to regulate commerce. This makes a jurisdictional test far too blunt an instrument for curtailing access to the courts.

Summit also argues (Pet. Br. 15-18) that peer review is a non-economic activity essential for the protection of parties and the public.[11] This assertion lends itself to two interpretations. It may mean only that a properly conducted peer review is not motivated by economic considerations. This merely changes the focus of the debate to the motives of the petitioners here, an issue not presented and hardly one which would justify dismissal of Dr. Pinhas's action. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473, 82 S.Ct. 486, 491 (1962).

It may also mean that the peer review process is "immune" to "infection" by wrongful activities. If so, it is inherently incapable of being used for an economic purpose. This implies that peer review does not fall within the definition of "trade or commerce" as used in the Sherman Act, thus rendering physicians who participate in it immune from suit under the Sherman Act. We must reject this approach (and a corollary to it) before showing that the Ninth Circuit correctly decided in favor of Dr. Pinhas.

### A. Peer Review Is An Economic Activity.

In describing hospital peer review as "non-economic", Summit focuses so closely on the *process* of peer review that it ignores its *impact*. Like other forms of professional regulation, peer review inevitably impacts the economics

[11]Amici Hospital Associations make this point the focus of their brief.



of the medical profession because it controls access to the marketplace.

Hospital staff membership provides the physician with several competitive advantages over non-members. Surgeons must have access to high technology equipment and highly trained support staff. Those with staff privileges can practice their specialty, those without them cannot. Dolan & Ralston, *Hospital Admitting Privileges And The Sherman Act*, 18 Houston L. Rev. 707, 713 (May 1981) ("Dolan & Ralston"); Joint Appendix, pp. 40-41. Even for other specialties, "the absence of admitting privileges is a competitive disadvantage, if for no other reason than it connotes a second-class practitioner." Dolan & Ralston, at 714. Moreover, physicians on staff gain access to referrals from other physicians and to new patients via the emergency room. *Id.* Thus, "physicians with privileges in a given area of practice have a competitive advantage over those without privileges." *Id.*

Peer review obviously results in a direct economic impact on the physician.[12] But the indirect effects can be even more damaging:

> "Although there may be more than one hospital in the relevant geographic market, excluding a physician from one hospital often leads to exclusion from other hospitals. Moreover, exclusion by one hospital may lead to disciplinary investigation by local medi-

[12]"Peer review recommendations denying, restricting or revoking privileges can provoke anger and can have a significant adverse economic impact on the affected physician." Brief of the American Medical Association, American Hospital Association, Joint Commission on Accreditation of Healthcare Organizations, Oregon Medical Association, Oregon Association of Hospitals, and American Medical Peer Review Association as Amici Curiae in Support of Respondents, pages 6-7, *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658 (1988).

cal boards and thus further impede an excluded physician's ability to practice medicine." Drexel, *The Antitrust Implications of the Denial of Hospital Staff Privileges,* 36 U. Miami L.Rev. 207, 231 (Jan. 1982) ("Drexel") (footnotes omitted).

This result is not fortuitous. California Business & Professions Code § 805 requires hospitals, under threat of criminal penalties, to report to the relevant licensing agency instances of denial, revocation, or restriction of staff privileges by a peer review body. Section 805.5 requires other hospitals, again under threat of criminal penalties, to obtain copies of any "805 Reports" before granting or renewing staff privileges. Congress has now established a national data bank for similar reports, making the impact national. HCQIA, 42 U.S.C. § 11131 et seq.[13]

Any peer review decision inherently affects the marketplace. Although it is perhaps not strictly relevant at this stage of the litigation, Dr. Pinhas wants there to be no misunderstanding: he does not contend that this inevitable impact of the process alone constitutes the substantive violation of the Sherman Act. Instead, the impact creates the relevant nexus with interstate commerce, while the substantive violation consists of the impact *combined with* Summit's abuse of peer review to exclude him from the market.

The potential for such abuse stems from a physician's dual role on a medical staff. Primarily, of course, a physician uses the hospital facilities to treat patients. But the physician must also function as a member of the

[13]These provisions directly affect Dr. Pinhas. As noted in footnote 1, *supra*, another Los Angeles hospital, Cedars-Sinai, has already denied him staff privileges based upon the Midway 805 Report.



medical staff. The medical staff assumes responsibility for the quality of patient care. As part of this group, a physician participates in the credentialing of other members and prospective members of the medical staff. See generally, Comment, *Medical Staff Membership Decisions: Judicial Intervention,* 1985 Ill. L. Rev. 473, 476-479.

This dual role creates obvious economic incentives. "[T]he decision to grant privileges in one's own specialty or subspecialty involves the diminution of one's own competitive advantage. * * * Therefore, a strong incentive exists to limit the number of people in one's own specialty or sufficiently related specialties. . . ." Dolan & Ralston, *supra,* at 715. No wonder that commentators conclude that "[a]n inherent conflict of interest therefore predominates the hospital privilege decision-making process." Comment, *Medical Staff Membership Decisions: Judicial Intervention,* 1985 U.Ill. L. Rev. 473, 478 (footnote omitted).[14]

Summit may argue that this description of the process overemphasizes the role of the medical staff, when it is the hospital board which makes the final decision on staff privileges. This argument again confuses process with impact. Dr. Pinhas need only show an *effect* on interstate

[14]Kissam, et al. note that there is "good reason for antitrust courts to regard medical staff recommendations on privilege questions as suspect and deserving of careful judicial scrutiny." Kissam, Webber, Bigus & Holzgraefe, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom,* 70 Cal.L.Rev. 595, 610 (May 1982). See also Havighurst, *Doctors and Hospitals: An Antitrust Perspective On Traditional Relationships,* 1984 Duke L.J. 1071, 1122 ("Because courts in privilege cases have not fully recognized the significance of competitor control, there is danger that their approach will sometimes be too deferential or not sufficiently penetrating to discover and penalize abuses by the medical staff of its dominant position."); Drexel, *supra,* at 223-224; and Dolan & Ralston, *supra,* at 752.

commerce, which exists regardless of who makes the decision. Peer review, by its very nature, has an *effect* on the relevant market (eye surgery).

### B. This Court Need Not Create A Special Exemption For Peer Review From Sherman Act Scrutiny Because Congress Has Already Acted To Preserve The Public Benefits of Peer Review.

If this Court were to treat peer review as a non-economic activity, not within the meaning of "trade or commerce", it would restore the "professionalism" defense rejected in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004 (1975) and *National Society of Professional Engineers v. United States*, 435 U.S. 679, 98 S.Ct. 1355 (1978). No reason exists to confer such preferred status on hospitals or their physicians engaging in peer review[15]

Dr. Pinhas understands that certain professional regulatory activities may not be treated as violations of the Sherman Act if the public benefits flowing from them are seen as outweighing their anti-competitive aspects. *Goldfarb*, 421 U.S. at 788 n.17 (1975). Summit suggests such an argument in its opening Brief (footnote 10). But Congress has already made its judgment and weighed the anti-competitive impact of peer review proceedings against the public benefit. HCQIA explicitly recognizes the need for peer review (42 U.S.C. § 11101) and balances it against the potential for abuse (42 U.S.C. § 11112).[16]

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[15] "Staff privileges issues are therefore appropriately considered without regard to any separate professionalism defense." Havighurst, *Doctors and Hospitals: An Antitrust Perspective On Traditional Relationships*, 1984 Duke L.J. 1072, 1104.

[16] See also H.R. Rep. No. 99-903, 99th Cong. 2d Sess. 9, reprinted in 1986 U.S. Code Cong. & Admin. News 6384, 6391, and see introductory remarks by the sponsor of HCQIA, Rep. Henry Waxman, during the floor debate on HCQIA: "The limited immunity provided under this bill is essential to encourage physicians and hospitals to participate in conducting effective peer review. The immunity provisions have been restricted so as not to protect illegitimate actions taken under the guise of furthering the quality of health care. Actions that violate civil rights laws or actions that are really taken for anticompetitive purposes will not be protected under this bill." (132 Cong. Rec. H9957 [daily ed. Oct. 14, 1986].)



This Congressional solution to an inherently legislative problem obviates the need for this Court to create any "implied exception" to the Sherman Act, *Goldfarb, supra*, 421 U.S. at 786-788.

### C. The Peer Review Process In General Indisputably Affects Interstate Commerce.

Having disposed of Summit's policy defenses, Dr. Pinhas can now do what Summit did not do, *viz.*, make a practical analysis of the Ninth Circuit's conclusion that the peer review process affects interstate commerce. The Ninth Circuit followed exactly the route taken in *McLain*. This Court did not engage in a detailed factual analysis relating real estate brokerage activities to interstate commerce.[17] Instead, it recited the logical connection between brokerage activities and interstate commerce:

> "Brokerage activities necessarily affect both the frequency and the terms of residential sales transactions. Ultimately, whatever stimulates or retards the volume of residential sales, or has an impact on the purchase price, affects the demand for financing and title insurance, those two commercial activities that

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[17] It did recite in detail the facts demonstrating that *other* aspects of real estate sales (e.g., mortgage loans and title insurance) involve interstate commerce.

on this record are shown to have occurred in interstate commerce." 444 U.S. at 246.

Just as obviously, the peer review process, by affecting all the physicians, affects the provision of hospital services needed by surgeons. As noted above, Summit is in no position to argue that its provision of hospital services does not involve interstate commerce.[18] Thus, the Ninth Circuit only commented on the irresistible force of the logic when it stated that the effect on interstate commerce was "a fact that can hardly be disputed."

Even if Summit tried to dispute the obvious, the basic principles of Sherman Act jurisdiction support the Ninth Circuit's conclusion. Because Congress uses the Sherman act as a method of regulating commerce, "The reach of the Sherman Act is 'as inclusive as the constitutional

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[18]As long ago as 1976, the Federation of American Hospitals argued, in an amicus brief filed in *Hospital Building Co. v. Trustees of the Rex Hospital*, 425 U.S. 738, 96 Ct. 1848 (1976),

> "[T]he conclusion reached by the Court of Appeals is unrealistic in view of the health care delivery system which presently exists in the United States. Today, conduct which affects the rendition of hospital services automatically affects the goods, services and activities which makes the delivery of those very hospital services possible.
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> • • •
>
> Because the operation of Mary Elizabeth, and hospitals like it, results in considerable involvement in interstate commerce, and because the provision of hospital services is inseparable from such interstate involvement, the effect of conduct which restrains the rendition of those hospital services necessarily has a direct and substantial effect on interstate commerce." Brief, Amicus Curiae, filed on behalf of the Federation of American Hospitals, *Hospital Building Company v. Trustees of the Rex Hospital*, at pages 7-8. See also pp. 15, 21, 26, and 27.



limits of Congress' power to regulate commerce.' Report of the Attorney General's National Committee to Study the Antitrust Laws 62 (1955)." *Rasmussen v. American Dairy Association*, 472 F.2d 517, 521 (9th Cir. 1973); *Musick v. Burke*, No. 89-55310 (9th Cir. Sept. 7, 1990).

If Congress can regulate an activity under the Commerce Clause, it can regulate it under the Sherman Act. "In resolving the jurisdictional issue, our task is to assume, without deciding, that the conduct complained of constitutes a violation of the Sherman Act and then to determine whether that conduct could be regulated under the commerce power." *Western Waste Service Systems v. Universal Waste Control*, 616 F.2d 1094, 1096 (9th Cir. 1980) (Kennedy, J.); *Rasmussen, supra.* Thus, the Ninth Circuit properly concluded that the peer review proceedings in general affect interstate commerce if Congress can regulate the peer review proceedings in general.

There can be little doubt that Congress possesses such power. Congress certainly believed that it did when it enacted HCQIA. If the Ninth Circuit erred in concluding that Midway's peer review proceedings in general form part of a class of activities affecting interstate commerce, *Perez, supra,* then the logical consequence of that error is that Congress also erred in believing that it has the constitutional authority to regulate those peer review proceedings. If so, then the only recourse is to declare HCQIA unconstitutional as beyond the scope of Congress's authority.[19]

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[19]Summit suggests in footnote 7 of its Brief that HCQIA does not "regulate" peer review. Dr. Pinhas has no desire to engage in a semantic debate over the definition of "regulate". He submits that the establishment of detailed procedural standards combined with mandatory reporting of peer review results can fairly be characterized as "regulation". In any event, the key point is that Congress

## IV.

## THIS COURT SHOULD DIRECT LOWER COURTS TO STOP FRUSTRATING CONGRESSIONAL INTENT BY IMPOSING ARTIFICIAL BARRIERS TO JURISDICTION UNDER THE SHERMAN ACT

Although Dr. Pinhas can and should prevail under the test imposed on him by the Ninth Circuit, he does not believe this Court should limit itself to that test or the strict confines of this case. Instead, he urges that this Court state in the most explicit possible terms that jurisdiction under the Sherman Act is co-extensive with Congressional power under the Commerce Clause.

Several commentators have noted that "[w]hereas the United States Supreme Court has engaged in a continual . . . trend towards expanding the jurisdictional reach of the Sherman Act, the lower courts have undermined this tendency by adopting conflicting interpretations of the Supreme Court's decisions." Mann, *The Affecting Commerce Test: The Aftermath of McLain*, 24 Houston L.Rev. 849, 850 (Oct. 1987) (footnotes omitted). This tendency is particularly evident in hospital staff privileges cases:

> "Despite the clear trends described above, many plaintiffs in hospital staff exclusion cases still are not given the opportunity to proceed to the merits of their cases because of summary dismissals on 'jurisdictional' grounds. Those 'jurisdictional' hurdles

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could only justify HCQIA pursuant to its Commerce Clause authority (note the findings in § 11101). Summit's attempt to distinguish HCQIA as a mere immunity statute for antitrust actions ignores the reporting provisions of § 11131 et seq. and also the fact that § 11111 grants immunity under *all* laws, State or Federal (a grant possible only if Congress exercises Commerce Clause authority).



> frustrate the expressed liberal policy of the Supreme Court in applying the interstate commerce requirement, defeat the remedial purpose of the antitrust laws in the health care field, and retard the policy of opening that field to the free play of market forces and the beneficial effects of free and open competition." Comment, *Sherman Act "Jurisdiction" in Hospital Staff Exclusion Cases*, 132 U.Pa.L.Rev. 121, 135 (Dec. 1983) (footnotes omitted).[20]

Although Summit and a number of lower courts have supported summary dismissal by reference to language contained in *McLain*, Dr. Pinhas does not believe that ambiguity within that opinion caused the problem. "Despite the reliance on language quirks within *McLain*, most of the confusion apparently emanates less from the opinion than from a fundamental refusal by lower federal courts to accept Sherman Act jurisdiction as co-extensive with the commerce power." Comment, *A Case Of Judicial Backsliding: Artificial Restraints On The Commerce Power Reach Of The Sherman Act*, 1985 Ill.L.Rev. 163, 181-182. This Court has the opportunity, by the opinion it will render here, to put an end to this "judicial backsliding."

In proposing the test described below, Dr. Pinhas is guided by three basic principles. First, Congressional

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[20]Such decisions include *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715 (10th Cir. 1980); *Furlong v. Long Island College Hospital*, 710 F.2d 922 (2d Cir. 1983); *Hayden v. Bracy*, 744 F.2d 1338 (8th Cir. 1984); *Seglin v. Esau*, 769 F.2d 1274 (7th Cir. 1985); *Stone v. William Beaumont Hosp.*, 782 F.2d 609 (6th Cir. 1986); *Doe v. St. Joseph's Hosp. of Fort Wayne*, 788 F.2d 411 (7th Cir. 1986); *Sarin v. Samaritan Health Center*, 813 F.2d 755 (6th Cir. 1987); *Thompson v. Wise General Hosp.*, 707 F. Supp. 849 (W.D. Va. 1989), *aff'd* 896 F.2d 547 (4th Cir. 1990); and *Mitchell v. Frank R. Howard Mem. Hosp.*, 853 F.2d 762 (9th Cir. 1988) *cert. denied*, 109 S.Ct. 1123 (1989).

power both to regulate commerce and to enact the Sherman Act, arises out of the Commerce Clause. *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 495, 60 S.Ct. 982, 993 (1940). Second, this Court has recognized for many years that in enacting the Sherman Act, Congress intended to exercise all of its authority under the Commerce Clause. *United States v. Frankfort Distilleries,* 324 U.S. 293, 298, 65 S.Ct. 661, 664 (1945). That authority is extensive: "The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." *United States v. Wrightwood Dairy Co.,* 315 U.S. 110, 119, 62 S.Ct. 523, 526 (1942).

Third, the Sherman Act itself is merely a vehicle or method by which Congress exercises its authority under the Commerce Clause; the Sherman Act is a means of regulating commerce. Congress, having established a national policy of free competition, *Apex Hosiery, supra,* 310 U.S. at 493 esp. n. 15, 60 S.Ct. at 992, cannot itself serve as a watchdog over every aspect of the national economy. Congress therefore created criminal penalties by which the Attorney General could enforce patterns of free trade, and civil penalties so that those who are themselves engaged in interstate commerce, or affected by it, can also guard the free flow of commerce. If Congress can regulate the activity directly, then no reason exists in law or policy to preclude indirect regulation of the same activity via the Sherman Act. See *Rasmussen, supra,* and *Western Waste, supra.*



This Court has long recognized that Congress may regulate any activity, no matter how local, which burdens or inhibits interstate commerce:

> "But even if appellee's activity be local *and though it may not be regarded as commerce,* it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect'." *Wickard v. Filburn,* 317 U.S. 111, 125, 63 S.Ct. 82, 89 (1942) (emphasis added). See also *Wrightwood Dairy, supra.*

The obvious reason for this is that economic activities cannot be neatly segregated as "interstate" and "non-interstate". For example, a company may use the profits of an intrastate enterprise to subsidize sales interstate. The local activities inevitably affect the profitability of the business as a whole, and thus those portions of it transacted interstate. By the same token, one anticompetitive act in a local market inevitably benefits the business as a whole, thereby subsidizing its efforts to compete in a larger free marketplace. Thus, if a firm's general business activities substantially affect interstate commerce, that fact alone provides the relevant nexus with interstate commerce. *McLain; Musick v. Burke,* No. 89-55310 (9th Cir. Sept. 7, 1990).

## V.

## CONCLUSION

This Court has not sustained a lower court's jurisdictional dismissal under the Sherman Act since 1947, *i.e.*, prior to the application of the "affecting commerce" test to Sherman Act cases in *Mandeville Island Farms, supra.*[21] To accomplish such a result, Summit would "return to a jurisdictional analysis under the Sherman Act of an era long past." *McLain*, at p. 244.

This Court can resolve the particular dispute herein merely by affirming that Dr. Pinhas can meet the test imposed on him by the Ninth Circuit. But the cases cited in footnote 20 demonstrate a compelling need for guidance to the lower courts. A strong statement by this Court affirming the equal reach of the Sherman Act and Congressional power under the Commerce Clause would prevent such injustices in the future.

DATED: September 18, 1990

LAWRENCE SILVER
A Law Corporation
LAWRENCE SILVER
MARK E. FIELD

By: _____
Lawrence Silver

BLECHER & COLLINS
MAXWELL M. BLECHER
ALICIA G. ROSENBERG
*Attorneys for Respondent*
*Simon J. Pinhas, M.D.*

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[21]Comment, *A Case Of Judicial Backsliding: Artificial Restraints On The Commerce Power Reach Of The Sherman Act*, 1985 Ill. L.Rev. 163, 176.

# APPENDIX A

## NOTE TO APPENDIX A

Dr. Pinhas needs to explain one aspect of this appendix which is irrelevant to the issues raised before this Court. Cedars-Sinai Hospital denied Dr. Pinhas privileges solely because it received a report from Midway "involving a suspension, loss or modification of Medical Staff privileges at Midway Hospital for reasons which included, without being limited to, *failure by you to do histories, physicals and workups.*" Emphasis added. Cedars did indeed receive a report which suggested such reasons for Midway's action against Dr. Pinhas. However, the Midway Judicial Review Committee specifically found that the charges of failure to do "histories, physicals and workups" were *not* sustained by the evidence. Joint Appendix, pp. 174-179.

[CEDARS-SINAI MEDICAL LETTERHEAD DELETED]

February 8, 1990

Simon J. Pinhas, M.D.
9033 Wilshire Boulevard
Suite #206
Beverly Hills, CA 90211

Dear Dr. Pinhas:

**RE: Notice of Denial of Medical Staff Membership Application and Notice of Charges**

This Notice of Denial and Charges is prepared pursuant to requirements set forth in the Constitution of the Medical Staff of Cedars-Sinai Medical Center (the "Constitution"). You are hereby informed that it has been recommended that you be denied Medical Staff membership.

Pursuant to Article III, Section 3(j)(i) of the Constitution, your application has been denied subject to: (a) the hearing and appeal rights set forth in Article XIII of the Constitution; (b) a positive decision from the hearing and/or appeal committee recommending approval of the application; (c) completion of the application process; and (d) ultimate approval of the application consistent with the Constitution and applicable Medical Staff Rules and Regulations.

The grounds for this action are based upon the following Medical Staff concerns:

a) Pursuant to review of your application, a material question exists with regard to your experience, current competence and good reputation not being documented with sufficient adequacy to assure the Cedars-Sinai Medical Staff and Board that any patient treated by you will receive the highest quality of medical care, (Constitution Article III, 1(b) and 3(j)(i); and



b) The evidence available pursuant to review of your application does not demonstrate that you have an acceptable interest, ability, and willingness to function effectively as a role model as required under Article III Section 1(e) of the Constitution.

The decision to take such action was made based upon the recommendation of the Surgical Advisory Committee and the Senior Vice President for Medical Affairs' reasonable effort to obtain the facts.

In reaching this decision, the following information was reviewed: Receipt by the Medical Staff of a Business and Professions Code 805 Report filed by Midway Hospital involving a suspension, loss or modification of Medical Staff privileges at Midway Hospital for reasons which included, without being limited to, failure by you to do histories, physicals and workups.

Consistent with the Constitution, you are hereby notified of your opportunity to have a Hearing Committee convened to review the action taken. Pursuant to Article XIII, Section 3 of the Constitution, you must request a hearing within thirty (30) days of receipt of this notice of charges. If you fail to request such a hearing in writing, sent to me by certified or registered mail, postage prepaid within thirty (30) days of your receipt of this notice, you will be deemed to have accepted the action involved. The action will become final upon the expiration of such thirty (30) day period.

In accordance with California Business and Professions Code Section 809.1, you are further hereby informed that if the above recommended action is adopted as "final" under the Constitution, the action shall be taken and reported pursuant to Business and Professions Code Section 805.

If you request to have a Hearing Committee convened, you will have the right to call, examine and cross-examine witnesses and to produce and to present written and oral evidence and may be represented by legal counsel of your choice. You may also be accompanied and represented at the Hearing by a physician or surgeon licensed to practice in the State of California and who, preferably, is a Medical Staff member in good standing at Cedars-Sinai Medical Center. You may also request to have a court reporter transcribe the hearing and to provide you with a copy of such transcript, at your cost. The hearing is informal in nature and not conducted according to the rules of law pertaining to the examination of witnesses or presentation of evidence. Any relevant evidence may be admitted regardless of the admissibility of such evidence in a court of law. Should you desire to obtain a list of witnesses to be called by the Medical Staff at the hearing, you should deliver a written notice to the undersigned of that desire.

A current copy of the Constitution is enclosed. If you have any questions regarding the contents of this letter or the hearing procedure, please contact me.

Sincerely,

James R. Klinenberg, M.D.
Senior Vice President for
Medical Affair

cpe

cc: Michael L. Langberg, M.D.
Peter Braveman, Esq.
Barry Silbermann, Esq.

Enclosure

# APPENDIX B

89 22 4129

**FORM 10-K**

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

(Mark One)

(X) ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934 (FEE REQUIRED)

For the fiscal year ended June 30, 1989.

( ) TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the transition period from _____ to _____
Commission file number 0-11479

**SUMMIT HEALTH LTD.**

(Exact name of Company as specified in its charter)

| California | 95-3154694 |
|---|---|
| (State or other jurisdiction of incorporation or organization) | (I.R.S. Employer Identification No.) |

2600 W. Magnolia Blvd., Burbank, CA 91505-3031
(Address of principal executive offices) (Zip Code)

Company's telephone number, including area code:
(818) 841-8750

Securities registered pursuant to Section 12(b) of the Act:

| Title of each class | Name of each exchange on which registered |
|---|---|
| None | None |

Securities registered pursuant to Section 12(g) of the Act:

Common Stock
(Title of Class)

Indicate by check mark whether the Company (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the Company was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days.

Yes X No

The aggregate market value of Common Stock held by non-affiliates* as of September 18, 1989 was $8,512,989.

DOCUMENTS INCORPORATED BY REFERENCE

Portions of the Company's and definitive proxy statement for its annual meeting of shareholders to be held on November 13, 1989, which will be filed with the Commission within 120 days of the Company's last fiscal year end, are incorporated by reference in Part III of this Form 10-K.

* Without acknowledging that any individual director of the Company is an affiliate, the shares over which they have voting control have been included as owned by affiliates solely for purposes of this computation.



## PART I

### Item 1. Business

### General

Summit Health Ltd. (which, together with its subsidiaries, is referred to as the "Company") is a health care company, which at June 30, 1989 operated 21 acute care hospitals, with a total of 2,977 licensed beds, and 17 nursing facilities, with a total of 2,230 licensed beds in California, Texas, Arizona, Iowa, Colorado, and in the Kingdom of Saudi Arabia. Subsequent to June 30, 1989, one hospital with 122 beds was closed. Eight of the acute care hospitals with a total of 1,229 licensed beds are located in the Kingdom of Saudi Arabia and are operated under three-year management agreements expiring in 1991. The Company also operates 16 medical office buildings for the staffs of its hospitals, four retirement hotels, two hemodialysis centers, one home health agency and four substance abuse centers. By providing a broad spectrum of integrated health care services to the communities it serves, the Company believes that it is competitively positioned to attract patients to its facilities.

As a result of Medicare and other cost containment legislation, it has become increasingly important to provide health care services in an efficient and cost effective manner. The Company believes that the integration of its hospitals with nursing and other health care facilities provides a more efficient health care delivery system than that provided by hospitals alone. The proximity of many of its hospitals to its nursing and other facilities makes a variety of health care services available to patients and encourages greater use of the Company's health care delivery system.

## Hospitals

The Company's hospitals provide health care services generally available in hospitals, including operating and recovery rooms, diagnostic radiology facilities, intensive care and coronary care facilities, pharmacies, clinical laboratories, rehabilitative therapy facilities, outpatient facilities and emergency departments. Certain of the hospitals offer specialized services, including open heart surgery, hemodialysis, obstetric departments and clinics specializing in treatment of industrial accidents. All of the Company's hospitals located in the United States are accredited by the Joint Commission on Accreditation of Healthcare Organizations and are certified for participation in the Medicare and Medicaid programs. In addition, some of the hospitals are also accredited by the American Osteopathic Association.

Each U.S. hospital is managed on a day-to-day basis by a full-time executive director employed by the Company. The medical and professional practice is governed by a medical executive committee of the medical staff under the authority of a board comprised primarily of staff physicians selected by their peers. The Company also has established a quality assurance committee at each hospital under the direction of a physician to review and to set standards for medical practices and nursing care and to assure compliance with regulatory standards. These committees develop quality assurance programs involving all departments, medical staffs, patients and services, and periodically monitor patient care, including admissions, discharges, length of stay and treatment. The Company has established utilization review committees which monitor patient care.

Hospital revenues depend primarily on occupancy rates, charges for room and board, the extent of and



charges for ancillary services provided to inpatients, and the extent of and charges for services provided to outpatients.

Occupancy rates are a function of admissions and length of patient stay and are affected by many factors, including the number of physicians using a hospital and the nature of their practices, the demographics of a hospital's service area, the characteristics of other hospitals in the same area and the degree of concern about health care costs. Management believes that nationwide downward trends in admissions and length of stay, which in turn affect occupancy rates, have resulted principally from government and private sector pressures to reduce inpatient hospitalization, such as the enactment of prospective payment reimbursement programs and the encouragement of preventive medicine and outpatient treatment. There can be no assurance as to future occupancy rates of the Company's hospitals.

The Company's domestic hospitals, currently in operation, have been experiencing declining occupancy levels and average lengths of hospital stays for the past few years. Declining occupancy levels and average length of hospital stay are national trends since the Federal Medicare program began to have reimbursement based upon Diagnosis Related Groups (DRG's). The growth of health maintenance organizations, increased use of non-hospital and outpatient surgical and diagnostic facilities, and use of home health care services, together with more stringent utilization review procedures have also contributed to the decline. The weighted average occupancy rate for these hospitals has declined from 45 percent for fiscal 1987 to 41 percent in 1988 and improved slightly to 42 percent for fiscal 1989.